

Warren Havens
& Polaris PNT PBC¹

September 25, 2016

To: Marlene Dortch, Secretary
Federal Communications Commission

Attn: Chief, Wireless Telecommunications Bureau
General Counsel, Office of General Counsel

Filed: On ECFS in dockets 11-71, 13-85, 11-79, 11-27, 10-83

Re: The April 2016 Third Circuit decision in *Havens v Mobex* (finding, *inter alia*, certain AMTS rules and rulings not enforceable), and petition for writ of certiorari filed September 12, 2016. Maritime Communications/ Land Mobile LLC (“MCLM”) is the respondent party in this case.^{2 / 3}

Re: Motion for declaratory ruling under §§ 1.2⁴ and 1.41.

The attached email and its attachments pertain to FCC AMTS geographic and site-based licenses and matters (as well as broader issues) that may affect matters in the dockets listed above.

The attached email and its attachments also relate to topics in my filing of yesterday in these dockets.

The below materials involve and include the April 2016 decision of the US Third Circuit Court in *Havens v Mobex*, currently before the US Supreme Court in a petition for a writ of certiorari filed by the undersigned on September 12, 2016.

AMTS licensing matters in the above dockets involve, *inter alia*, the certain AMTS rules and declaratory ruling order and letters found unenforceable by the Third Circuit.

I believe, and hereby request under rule §§ 1.2 and 1.41, that the Commission and its relevant Bureaus and Offices should consider and issue a decision on the legal ramifications

¹ A Delaware Public Benefit Corporation. Warren Havens, the undersigned, presents this only for himself individually and for Polaris PNT PBC, as its President. See also footnote 5.

² To the extent its Chapter 11 successors, the Choctaw companies, have de facto control, then those companies are involved also.

³ Regarding the other defendants, PSI and TouchTel settled, and Mobex (supposedly subsumed in MCLM) defaulted.

⁴ §1.2 provides: “Declaratory rulings. (a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”

of this Third Circuit decision, including with regard to the “issue-g” stage of the docket 11-71 proceeding under the *OSC-HDO FCC 11-64*⁵ (and related matters in the other dockets above including 13-85) to decide:

- The broad issues posed by this Third Circuit decision are shown below.
- The more narrow issues posed by this Third Circuit decision regarding proceeding 11-71, including if new trial and pre-trial proceedings in 11-71 be held regarding issue (g) that led to decisions by the FCC administrative law judge in that regarding those proceedings?⁶

As shown by the quoted text below, this Third Circuit decision pertains to “issue g” in the *FCC 11-64* regarding site-based AMTS licensed stations, their required “construction” and operation, permitted service “contours,” and permitted protection as to the location, contours, and operations of geographic AMTS stations.

My position, shown in the cert petition, differs from the Third Circuit Court’s ruling. However, unless rejected or remanded by the Supreme Court if the cert petition is granted, this ruling (copy attached) stands. It includes:

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As in *Mallenbaum*, we will not adopt either approach to defining “order” under §401(b) because 47 C.F.R. § 80.385(b)(1) and the Cooperation Orders fail under both standards. For its part, § 80.385 does not address a site-based licensee’s duty to provide contour information. In fact, it is focused solely on the obligation of a geographic licensee to protect the site-based licensee’s rights by adhering to certain requirements, and imposes no obligations on site-based licensees.^{21/} While the rule may “presuppose” that a site-based licensee will provide a geographic licensee its coordinates to safeguard its own interests, such an assumption cannot form the basis of an enforceable “order” under § [go to next page]

21/ 47 C.F.R. § 80.385(b)(1) (“[E]ach AMTS geographic area licensee may place stations anywhere within its region without obtaining prior Commission approval provided: (1)The AMTS geographic area licensee must locate its

⁵ The undersigned is designated as an individual party in FCC 11-64 for reasons shown in the proceedings cited therein leading to FCC 11-64 (confirmed in FCC 16-120).

⁶ Extensive evidence central to “issue g” in proceeding 11-71 that was not yet accepted is shown in Attachment B hereto, separately uploaded. See also FCC 16-120 as to other unresolved evidence issues. I also submit that the Commission must have made incorrect assumptions in granting relief in FCC 14-133 based on footnote 7 in FCC 11-64 as to the extent of wrongdoing, since the relief was granted to MCLM (and not only to the subject railroad), and the extent of wrongdoing known from 11-71 at the time of FCC 14-133 was based on incomplete and improper evidence taking, indicated above.

stations at least 120 kilometers from the stations of co- channel site-based AMTS licensees . . .”).

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401(b). Since 47 C.F.R. § 80.385(b)(1) imposes no duties on MCLM, it does not afford plaintiffs a remedy.^{22/}

Similarly, the Cooperation Orders do not impose any obligations on MCLM. Most of the language highlighted by plaintiffs describes the FCC’s mere expectation that site- based and geographic licensees will cooperate with one another.^{23/} This makes sense considering that the documents were not intended to address a site-based licensee’s obligations. Like § 80.385, the Cooperation Orders describe a geographic licensee’s duty to a site-based licensee: the first and third documents provide the procedure for determining the necessary level of interference protection and the second document resolves a dispute concerning interference. Only in dicta—indeed, relegated mostly to footnotes—did the FCC describe any duty owed by site-based licensees. We do not view this language as creating any binding or enforceable requirement under § 401(b).

22/ See *Mallenbaum*, 74 F.3d at 469; see generally *CBS*, 316 U.S. at 416-25. 23 See, e.g., *Letter*, 24 FCC Rcd. at 4136 n.9 (“[W]e expect incumbent AMTS licensees to cooperate with geographic licensees in order to avoid and resolve interference issues.” (internal quotations omitted)); *NUSCO Order*, 24 FCC Rcd. at 3311 n.12 (“AMTS site-based incumbents are expected to cooperate with geographic licensees in order to avoid and resolve interference issues.”); *Reconsideration Order*, 25 FCC Rcd. at 3807 ¶ 6 (“AMTS site-based licensees are expected to cooperate with geographic licensees in avoiding and resolving interference issues . . .”).

23/ See, e.g., *Letter*, 24 FCC Rcd. at 4136 n.9 (“[W]e expect incumbent AMTS licensees to cooperate with geographic licensees in order to avoid and resolve interference issues.” (internal quotations omitted)); *NUSCO Order*, 24 FCC Rcd. at 3311 n.12 (“AMTS site-based incumbents are expected to cooperate with geographic licensees in order to avoid and resolve interference issues.”); *Reconsideration Order*, 25 FCC Rcd. at 3807 ¶ 6 (“AM

A party may at any time, including in a petition under § 208 of the Communications Act,⁷ seek, obtain, or have imposed on the party, a FCC ruling as to the meaning, rights and obligations of an FCC rule at issue, including a finding that the rule is not enforceable in^a case presented (and by precedent, in like cases).

⁷ See, e.g., *In the matter of...Airtouch*, MO&O DA 00-1164, ¶10 and footnote 12.

I believe this would preclude a different finding by a US District Court in^a case brought under § 207 for the same thing.

As shown below, the reverse also appears to hold, and if that is the case, then this Third Circuit Court's decision would appear to have legal effect upon the FCC and parties before the FCC on what the court decided, including what is quoted above.

Global Crossing v. Metrophones, 550 U.S. 45 (2007) is central to this Third Circuit decision and the cert petition. The United States' position in that case, briefly discussed in the cert petition, is further discussed in James B. Speta & Joseph D. Kearney, *May a Private Party Sue In Federal Court to Enforce an FCC Regulation?*, 34 Preview U.S. Sup. Ct. Cas. 31 (2006):

On the merits of the FCC's interpretation, Metrophones notes that carriers including Global Crossing had an opportunity previously to challenge the FCC's pay phone rules and to challenge the FCC's statement that violations of the regulation constituted a violation of the statute through the typical route of a direct challenge to the regulations....
[. . . .]

The United States, in an amicus brief signed by the Solicitor General and the FCC, supports Metrophones. The United States' brief also argues that, if the Court adopts Global Crossing's argument, the enforcement scheme of the Communications Act will be radically changed. The government notes that sections 206-208 of the Communications Act not only govern private rights of action in federal district court but also complaints to the FCC. If these sections were interpreted in a way that foreclosed a private lawsuit in federal court, private parties would also lose the right to bring an administrative complaint before the FCC. In the main, then, FCC regulations could only be enforced by penalty or forfeiture proceedings initiated by the agency itself, which, the United States says, "could have effects in regulatory areas far beyond pay phone compensation disputes and has the potential to restrict dramatically private enforcement of the Communications Act."
[. . . .]

As competition is developing in telecommunications markets, the FCC is actually seeking to move in the other direction, toward less rule making and administrative enforcement and toward more private party-driven resolution of conflicts under the act...

Likewise, from the FCC's Amicus brief in the Fourth Circuit case 12-1322, *Central Telephone Company Of Virginia v. Sprint*:

The FCC's jurisdiction to entertain complaints under section 208 of the Act rests on an equal footing with the jurisdiction of the federal district courts under section 207 of the Act: the Act provides that an aggrieved party "may either" file a complaint with the FCC or sue in federal district court, "but such person shall not have the right to pursue both such remedies." 47 U.S.C. §

207. Accordingly, the FCC's precedents establishing that the agency has jurisdiction under section 208 to entertain complaints... in the first instance strongly suggest that the federal district courts likewise may be called upon....



Warren Havens
Individually
And as President of Polaris PNT, PBC

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Attachment A - relating to and containing the Havens v Mobex Third Circuit decision,
and the petition for a writ of certiorari before the SCOTUS, Sept. 2016.

Attachment B - regarding proceeding 11-71, missing critical evidence not accepted,
and related matters.